APPENDIX A

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

Docket No. 03-7773

SECURITY INSURANCE COMPANY OF HARTFORD,
Plaintiff-Appellee,

TRUSTMARK INSURANCE COMPANY,
Defendant-Third-Party-Plaintiff-Appellee,

v.

TIG INSURANCE COMPANY,
Third-Party-Defendant-Appellant.

Argued: Nov. 21, 2003.
Decided: March 2, 2004.

Before: OAKES, POOLER, and WESLEY, *Circuit Judges*.

WESLEY, *Circuit Judge*.

This case presents a recurring and troubling theme in many commercial contracts: to what extent must a court—confronted with a choice-of-law provision in a contract—incorporate the designated state's statutory and common law governing arbitrations even when doing so seems contrary to the Federal Arbitration Act ("FAA")?

I. *Background*

TIG Insurance Company ("TIG") and Security Insurance Company of Hartford ("Security") entered into a contract ("Reinsurance Agreement") whereby Security agreed to

reinsure a portion of TIG's liability for certain workers' compensation claims. The agreement was negotiated by Security's agent WEB Management LLC ("WEB"). The Reinsurance Agreement contains an arbitration clause in Article 27 [sic] submitting "any irreconcilable dispute between parties" to arbitration[1] and a choice-of-law clause in Article 28 [sic] that designates California's law as controlling.[2]

At the time it entered into the Reinsurance Agreement with TIG, Security also entered into another contract ("Retrocession Agreement") with Trustmark Insurance Company ("Trustmark") whereby Trustmark agreed to reinsure Security for 100% of the risk that Security had assumed from TIG under the Reinsurance Agreement. WEB acted as agent for both Security and Trustmark with regard to the Retrocession Agreement. That agreement does not contain an arbitration clause.

Several years thereafter, Trustmark informed Security that TIG had defrauded WEB in connection with the Reinsurance Agreement and suggested Security rescind that agreement. Security requested Trustmark provide proof of the alleged fraud. Instead of providing the requested proof, Trustmark notified Security it was rescinding their agreement. Security filed a complaint against Trustmark in federal court seeking

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[1] In full, the arbitration clause reads: "As a condition precedent to any right of action hereunder, any irreconcilable dispute between parties to this Agreement shall be submitted for decision to a board of arbitration composed of two arbitrators and an umpire meeting a place [sic] to be agreed by the board."

[2] In full, the governing clause states: "This Agreement shall be governed by and construed according to the laws of the state of California, except as to rules regarding credit for reinsurance in which case the rules of all applicable states shall pertain thereto. Notwithstanding the foregoing, in the event of a conflict between any provision of this Agreement and the laws of the domiciliary state of any company intended to be reinsured hereunder, that domiciliary state's laws shall prevail."

declarations that Trustmark was not entitled to rescind the Retrocession Agreement, that the agreement remained valid and binding, and that Trustmark was required to pay Security for all losses covered by the agreement.[3] Trustmark then filed a third-party complaint against TIG alleging TIG had fraudulently induced the Retrocession Agreement in an "attempt to transfer to its unsuspecting reinsurers[, Security and Trustmark,] tens of millions of dollars in losses stemming from its under-performing workers' compensation business."

A month prior to Trustmark's third-party complaint, Security suspended further claim payments to TIG based on Trustmark's allegations of fraud. In response, TIG invoked the arbitration clause in the TIG/Security Reinsurance Agreement. Security invited Trustmark to undertake the defense of TIG's claims against Security and further proposed resolving all of the issues pending in the lawsuit through arbitration. Security and Trustmark were unable to agree and the arbitration proceeded. As of this appeal, Security and TIG had selected the arbitrators and umpires, submitted positional statements to the arbitration panel, held an organizational hearing, and submitted proposed briefing and hearing schedules. Prior to the hearing, which was set to begin on August 11, 2003, however, Security moved before the arbitration panel to stay the arbitration pending the trial in the district court.

Thereafter, Security moved in district court to stay the arbitration pending completion of the court action. Security asserted that the choice-of-law provision in the Reinsurance Agreement reflects the intentions of TIG and Security to apply California's arbitration rules. Those rules include California Civil Procedure Code § 1281.2(c)(4),

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[3] Security also included claims under the Connecticut Unfair Insurance Practices Act, the Connecticut Unfair Trade Practices Act, and the common law for bad faith.

which permits a court to stay a pending arbitration where one of the parties is also a party to a pending court action arising out of the same transaction and there is a possibility of conflicting rulings.

The district court granted Security's motion relying primarily on *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). *See Sec. Ins. Co. of Hartford v. Trustmark Ins. Co.*, 283 F.Supp.2d 602 (D.Conn.2003). The district court rejected TIG's argument that *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), required a different result. *See Sec. Ins. Co.*, 283 F.Supp.2d at 606-07. The court utilized California state law to determine whether the choice-of-law provision evidenced the parties' intent to incorporate California's arbitration rules. *See id.* at 608-10. Relying on a recent California Court of Appeals decision, the district court concluded that section 1281.2(c)(4) was applicable and stayed the pending arbitration between TIG and Security until the proceedings in the district court were completed. The district court also concluded that its ruling was not inconsistent with Second Circuit cases TIG had raised in opposition to the stay, noting those cases involved New York law. *See id.* at 610-11. The district court also held that Security's conduct in preparation for arbitration did not waive its right to seek the stay. *See id.* at 611.

TIG appeals and we now affirm the district court's order.

II. *Discussion*

Section 2 of the FAA ensures that courts enforce arbitration clauses incorporated in contracts involving interstate commerce, thereby "creat[ing] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74

L.Ed.2d 765 (1983); *see also* 9 U.S.C. § 2. The FAA requires that "questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration," and that "any doubts concerning the scope of arbitrable issues . . . be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25, 103 S.Ct. 927. The federal policy favoring arbitration, however, does not change the long established principle that "[a]rbitration 'is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir.1996) (quoting *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). Rather, the FAA requires "arbitration proceed *in the manner provided for in [the parties'] agreement.*" *Volt*, 489 U.S. at 475, 109 S.Ct. 1248 (quoting 9 U.S.C. § 4) (emphasis in original). In *Volt*, the Court made clear that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476, 109 S.Ct. 1248.

Security agrees that the Reinsurance Agreement falls within the scope of the FAA, but argues that by including the California choice-of-law provision, the parties' evidenced their intent to employ California arbitration rules. Section 1281.2(c) provides that if a "court determines that a party to [an] arbitration is also a party to litigation in a pending court action or special proceeding with a third party [arising out of the same transaction and there is a possibility of conflicting rulings on a common issue of law or fact], the court . . . (4) may stay arbitration pending the outcome of the court action or special proceeding." Cal.Civ.Proc.Code § 1281.2(c). Security contends that this section does not manifest a preference for lawsuits over arbitration, but is merely a procedural mechanism that dictates the order in which the

two proceedings are to occur. It relies heavily on *Volt* and rightly so.

In *Volt*, the Supreme Court held that this specific provision is not preempted by the FAA "in a case where the parties have agreed that their arbitration agreement will be governed by the law of California." *Volt*, 489 U.S. at 470, 109 S.Ct. 1248. Volt Information Sciences, Inc. ("Volt") and Leland Stanford Junior University ("Stanford") had entered into a contract providing that all disputes would "be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing unless the parties mutually agreed . . . otherwise." *Id.* at 470 n. 1, 109 S.Ct. 1248. The agreement also provided that it would "be governed by the law of the place where the Project was located," which under the facts of *Volt* was California. *Id.* at 470, 109 S.Ct. 1248. When Stanford filed suit in federal court against Volt and several third parties, Volt moved to compel arbitration, leading Stanford to move to stay arbitration under section 1281.2(c)(4). *Id.* at 470-71, 109 S.Ct. 1248. The California Court of Appeals affirmed the lower court's grant of the stay, recognizing that the contract was subject to the FAA but holding that, by specifying the contract would be governed by California law, the parties had incorporated California's arbitration rules into their agreement. Thus, the parties contractually had agreed that arbitration would be governed by section 1281.2(c)(4) allowing a court to stay the arbitration. The Supreme Court upheld the stay and the court's construction of the choice-of-law provision noting that federal policy favoring arbitration did not require a certain set of procedural rules, "even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." *Id.* at 479, 109 S.Ct. 1248.

In *Volt*, the parties were permitted to structure their arbitration procedures as they saw fit, including incorporating

California law. Furthermore, the Supreme Court refused to review the California court's construction of the contract noting that "the interpretation of private contracts is ordinarily a question of state law." *Id.* at 474, 109 S.Ct. 1248; *see also PaineWebber*, 81 F.3d at 1198 ("[I]n interpreting an arbitration agreement we apply the principles of state law that govern the formation of ordinary contracts."). *Volt* controls the present case. It compellingly tells us that section 1281.2(c)(4) is a procedural rule for arbitration and therefore is not preempted by the FAA. The only remaining question is whether the choice-of-law provision reveals the intention of TIG and Security to incorporate California's procedural arbitration rules—including section 1281.2(c)(4)—into the contract. The district court, following *Volt*'s instruction, looked to California law.

TIG argues that *Mastrobuono*, as well as Second Circuit precedent, has altered *Volt*'s directive with regard to analyzing choice-of-law clauses in contracts. TIG contends that those cases now require that as a matter of *federal* law, general choice-of-law clauses do not incorporate state rules that govern the allocation of authority between courts and arbitrators. While TIG may have correctly characterized *Mastrobuono*, the procedural provision in question here does not limit an arbitrator's authority. In *Mastrobuono*, the parties incorporated an arbitration clause in their contract requiring the arbitration proceedings be conducted in accordance with the rules of the National Association of Securities Dealers. Those rules allow arbitrators to award punitive damages. However, the contract also contained a choice-of-law provision stating the agreement would be "governed by the laws of the state of New York." *Mastrobuono*, 514 U.S. at 59 n. 2, 115 S.Ct. 1212. In New York, the *Garrity* rule provides that the power to award punitive damages is limited to judicial tribunals and is not within an arbitrator's authority. *Id.* at 55, 115 S.Ct. 1212 (citing *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831, 353

N.E.2d 793 (1976)). Following arbitration and an award of punitive damages, respondents in *Mastrobuono* moved to vacate the award.

The Court recognized that "the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards." *Id.* at 62, 115 S.Ct. 1212. In an attempt to give effect to all of the provisions of the contract, the Supreme Court held that "the best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, *but not to include special rules limiting the authority of arbitrators.*" *Id.* at 63-64, 115 S.Ct. 1212 (emphasis added). Following *Mastrobuono*, our circuit has held that a general "choice of law provision will not be construed to impose substantive restrictions on the parties' rights under the Federal Arbitration Act." *PaineWebber*, 81 F.3d at 1202. Similarly, this Court has rejected the argument that a general choice-of-law provision without more evidences the parties' intent "to incorporate New York decisional law on the allocation of powers between the court and the arbitrator." *Nat'l Union Fire Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 134 (2d Cir.1996); *see also Shaw Group, Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 123 (2d Cir.2003).

The Second Circuit cases dealt with New York not California law. But more importantly, these cases involved "substantive restrictions on the parties' rights under the Federal Arbitration Act," *PaineWebber*, 81 F.3d at 1202, or "special rules limiting the authority of arbitrators." *Mastrobuono*, 514 U.S. at 64, 115 S.Ct. 1212. In cases where an ambiguity is introduced by the choice-of-law provision, federal policy favoring arbitration requires a specific reference to the restrictions on the parties' substantive rights or the arbitrator's powers to establish that the parties clearly

intended to limit their rights under the FAA. The present case does not involve those types of restrictions. Section 1281.2(c)(4) gives the court the power to stay an arbitration; it does not limit the rights of the parties to arbitrate particular issues or the arbitrator's power to resolve the dispute. As *Volt* makes clear, section 1281.2(c)(4) is a "state procedural rule[ ]" that "determine[s] only the efficient order of proceedings" and does "not affect the enforceability of the arbitration agreement itself." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (citing *Volt*, 489 U.S. at 478-79, 109 S.Ct. 1248). As the district court correctly held, *Volt* tells us that the FAA does not preempt section 1281.2(c)(4) and therefore, we return to the question previously raised—how does California law interpret the choice-of-law provision utilized in this contract.

The district court looked to the California state court decision in *Volt* as well as a more recent case, *Mount Diablo Medical Center v. Health Net of California, Inc.*, 101 Cal.App.4th 711, 124 Cal.Rptr.2d 607 (Cal.Ct.App.2002), to chart a course in this regard.[4] As noted above, in *Volt*, the California Court of Appeals interpreted a similar choice of law provision as evidencing an intent to include section 1281.2(c)(4). Unfortunately, we cannot rely on the Court of

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[4] TIG correctly argues that, except in rare circumstances, we defer to the Ninth Circuit's "prediction of the course of [California] law on a question of first impression within [California]." *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 283 (2d Cir.1981). TIG contends that the Ninth Circuit has indicated that California law would require that a choice-of-law clause would have to incorporate specifically California's procedural arbitration rules. *See Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205 (9th Cir.1998). TIG's reliance on *Wolsey* is misplaced, however, because in that case the Ninth Circuit relied on its interpretation of *Mastrobuono* to conclude that the choice-of-law provision did not incorporate section 1281.2(c)(4). *See id.*, 144 F.3d at 1212. The Ninth Circuit did not predict how the California Supreme Court would rule on the question of state law.

Appeals' decision in *Volt*; the California Supreme Court denied discretionary review in that case and ordered that the opinion not be published. Thus, under California law, that decision cannot be considered authoritative. *See* California Rule of Court 977.

In *Mount Diablo*, the contract in question included a broad choice-of-law clause that read: "The validity, construction, interpretation and enforcement of this Agreement shall be governed by the laws of the state of California." *Mount Diablo*, 101 Cal.App.4th at 716, 124 Cal.Rptr.2d 607. In determining the parties' intentions, the court observed that although the choice-of-law clause was "generic" because it did not mention arbitration, it was still "broad, unqualified and all-encompassing." *Id.* at 722, 124 Cal.Rptr.2d 607. Thus, the choice-of-law provision was construed to incorporate California's procedural rules regarding arbitration including section 1281.2(c)(4).

The choice-of-law provision in the present case is similarly broad and all encompassing. We agree with the district court that the California Supreme Court would conclude it evidences the parties' intent to incorporate section 1281.2(c)(4). California abides by the general proposition that sophisticated commercial parties intend a generic choice-of-law clause to control the entire agreement. *See Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 468-69, 11 Cal.Rptr.2d 330, 834 P.2d 1148 (1992). *Nedlloyd* involved language identical to the clause in the Reinsurance Agreement, except for the forum selected—Hong Kong. *Id.* at 463, 11 Cal.Rptr.2d 330, 834 P.2d 1148. In that case, the California Supreme Court reasoned that "[t]he phrase 'governed by' is a broad one signifying a relationship of absolute direction, control, and restraint." *Id.* at 469, 11 Cal.Rptr.2d 330, 834 P.2d 1148. In addition, the choice-of-law provision in the present case includes an exception for "rules regarding credit for reinsurance in which case the rules of all applicable states

shall pertain thereto." If the parties intended for only California substantive law to govern, they could easily have made their intentions clearer with a second exclusion for California's arbitration rules.

Finally, as the *Mount Diablo* court observed, "where the state arbitration provision is not inconsistent with the FAA policy of enforcing arbitration procedures chosen by the parties, choice-of-law clauses making no explicit reference to arbitration commonly have been interpreted to incorporate the state's law governing the enforcement of arbitration agreements." *Mount Diablo*, 101 Cal.App.4th at 725, 124 Cal.Rptr.2d 607.[5] The Supreme Court has examined the procedural rule in question here and found it consistent with the FAA's broad policy goals. *See Volt*, 489 U.S. at 479, 109 S.Ct. 1248. We believe the district court was correct in determining that the California Supreme Court would rule that the choice-of-law provision did incorporate the state's procedural rules for arbitration. Thus, we affirm its holding.

We also find TIG's waiver argument without merit. TIG claims Security's participation in the preliminary arbitration proceedings resulted in a waiver of its right to seek a stay of the arbitration pending the outcome of the related litigation. To support its argument, however, TIG cites only cases that stand for the principle that a party that engages in an arbitration hearing cannot then contest the right to arbitrate. *See, e.g., Opals on Ice Lingerie v. Body Lines Inc.*, 320 F.3d 362, 368 (2d Cir.2003); *ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 685 (2d Cir.1996).

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[5] We do not accept TIG's argument that *Mount Diablo* is distinguishable because the choice-of-law clause included the phrase "enforcement." The court reasoned that the inclusion of this phrase helped the court discern the parties' intent to include section 1281.2(c)(4), but contrary to TIG's argument, this was not the sole ground for the court's finding. *Mount Diablo*, 101 Cal.App.4th at 722-25, 124 Cal.Rptr.2d 607.

In this case, the arbitration hearing has not commenced. Furthermore, Security notified TIG and the arbitration panel early in the proceedings of the possibility that it would move to stay the arbitration while the litigation was pending. Thus, we affirm the district court's holding.

III. *Conclusion*

The district court's order of August 5, 2003, granting appellee's motion to stay the pending arbitration is hereby AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. CONNECTICUT.

No. CIV.3:01CV2198(PCD).

SECURITY INSURANCE COMPANY OF HARTFORD,
Plaintiff,

v.

TRUSTMARK INSURANCE COMPANY,
Defendant.

Aug. 5, 2003.

RULING ON PLAINTIFF'S MOTION TO STAY ARBITRATION

DORSEY, *District Judge*.

Plaintiff moves to stay arbitration proceedings between it and third party defendant TIG Insurance Co. ("TIG") pending the outcome of the present litigation. The motion to stay is granted.

I. BACKGROUND

Familiarity with the prior rulings of this Court is presumed. TIG and plaintiff entered into a Reinsurance Agreement ("Agreement"), effective January 1, 1999, which contains an arbitration clause providing that

> As a condition to any right of action hereunder, any irreconcilable dispute between the parties to this Agreement shall be submitted to a board of arbitration com-

> posed of two arbitrators and an umpire meeting at a place to be agreed by the board. . . . The majority decision of the board shall be final and binding upon all parties to the proceeding. Judgment may be entered upon the award of the board in any court having jurisdiction.

The Agreement also contains a separate choice of law clause providing that

> This Agreement shall be governed by and construed according to the laws of the state of California, except as to rules regarding credit for reinsurance in which case the rules of all applicable states shall pertain thereto. Notwithstanding the foregoing, in the event of a conflict between any provision of this Agreement and the laws of the domiciliary state of any company intended to be reinsured hereunder, that domiciliary state's laws shall prevail.

On May 3, 2002, defendant filed a third-party complaint against TIG alleging fraud and negligent misrepresentation "based upon the material misrepresentations and omissions made by [TIG] in its attempt to transfer to its unsuspecting reinsurers tens of millions of dollars in losses stemming from its under-performing workers' compensation business." Defendant seeks damages equal to "all net losses [defendant] has paid or is required to pay to [plaintiff] on the TIG business retroceded to [defendant] by [plaintiff]."

By letter dated June 27, 2002, TIG notified that it was invoking the arbitration clause and initiating arbitration. TIG moved to stay proceedings in the present case pending resolution of issues through arbitration, which motion was denied.

II. DISCUSSION

Plaintiff argues that arbitration should be stayed (1) pursuant to CAL. CIV. PROC. CODE § 1281.2(c)[1] or (2) under the All Writs Act, 28 U.S.C. § 1651.[2] TIG responds that this Court has no authority to grant a stay of the arbitration proceedings.

Plaintiff argues that this Court may grant a stay pursuant to § 1281.2(c), notwithstanding the absence of such a provision in the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, which undisputedly applies to the present agreement absent an exception to its applicability.

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[1] CAL. CIV. PROC. CODE § 1281.2 provides in relevant part that "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that . . . (c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. . . . If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

[2] As plaintiff's motion is granted based on state law, there is no need to address whether such authority exists under the All Writs Act.

This is not the first time a party has sought to stay arbitration proceedings in deference to ongoing litigation. In *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 470-72, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), a California Court of Appeal construed a choice of law clause providing that "[t]he Contract shall be governed by the law of the place where the Project is located" as incorporating the California procedural law and affirmed the trial court decision granting a stay of arbitration pursuant to § 1281.2(c). The California Supreme Court denied discretionary review, and the United States Supreme Court granted certiorari. *Volt Info. Sciences*, 489 U.S. at 472, 109 S.Ct. 1248. In resolving the potential conflict between the FAA and California arbitration law, the Court deferred to the state court interpretation of the choice of law provision. *Id.* at 474, 476, 109 S.Ct. 1248 ("assuming the choice-of-law clause meant what the Court of Appeal found it to mean"), and concluded that

> we do not think the Court of Appeal offended the *Moses H. Cone* principle by interpreting the choice-of-law provision to mean that the parties intended the California rules of arbitration, including the § 1281.2(c) stay provision, to apply to their arbitration agreement. There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.

Id. at 476, 109 S.Ct. 1248. The Court further concluded that "Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the

terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward." *Id.* at 479, 109 S.Ct. 1248.

While plaintiff argues that *Volt* resolves the present question and permits the application of the § 1281.2(c) stay provision, TIG argues that *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), requires otherwise. *Mastrobuono* involved a New York law granting courts the authority to award punitive damages by refusing such authority to arbitrators, and a choice of law clause providing that the agreement "shall be governed by the laws of the State of New York." *Id.* at 53, 115 S.Ct. 1212. The arbitrators awarded compensatory and punitive damages, but a federal district court vacated the punitive damages award concluding that the arbitrators were without authority to issue the award, which decision was affirmed by the court of appeals. *Id.* at 54-55, 115 S.Ct. 1212. Certiorari was granted "because the Courts of Appeals have expressed differing views on whether a contractual choice-of-law provision may preclude an arbitral award of punitive damages that otherwise would be proper." *Id.* at 55, 115 S.Ct. 1212.

In reversing the decision of the Court of Appeals, the Court interpreted the two successive sentences in the agreement providing that the "agreement . . . shall be governed by the laws of the State of New York" and "any controversy . . . shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange Inc." *Id.* at 58 n. 2, 115 S.Ct. 1212. The Court concluded that "[a]t most, the choice-of-law clause introduces an ambiguity into an arbitration agreement that would otherwise allow punitive damages awards," *id.* at 62, 115 S.Ct. 1212. Using

as guidelines the principles that "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration," *id.*, "the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it," *id.*, and that "a document should be read to give effect to all its provisions and to render them consistent with each other," *id.* at 63, 115 S.Ct. 1212, the Court concluded that the Court of Appeal misinterpreted the agreement and reversed the order vacating the punitive damages award by the arbitrators, *id.* at 64, 115 S.Ct. 1212.

The import of the *Mastrobuono* and *Volt* decisions is a fertile source of debate,[3] with state and federal courts arriving at conclusions far too varied to mention here. In an effort to resolve conflicting interpretations, two circuit courts have adopted a presumption "that a generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards." *Roadway Package Sys. v. Kayser*, 257 F.3d 287, 296 (3d Cir.2001); *Sovak v. Chugai Pharm.*, 280 F.3d 1266, 1269 (9th Cir.2002) ("the strong default presumption is that the FAA, not state law, supplies the rules for arbitration").

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[3] *See, e.g.*, Thomas A. Diamond, *Choice of Law Clauses and Their Preemptive Effect on the Federal Arbitration Act: Reconciling the Supreme Court with Itself*, 39 ARIZ. L. REV. 35 (1997); Heather J. Haase, Note, *In Defense of Parties' Rights to Limit Arbitral Awards Under the Federal Arbitration Act: Mastrobuono v. Shearson Lehman Hutton, Inc.*, 31 WAKE FOREST L. REV. 309 (1996); Joshua M. Barrett, Note, *Federal Arbitration Policy After Mastrobuono v. Shearson Lehman Hutton, Inc.*, 32 WILLAMETTEL. REV. 517, 534 (1996). It is noteworthy, given the problems presented by the interaction of arbitration and choice of law clauses, that the Ninth Circuit Court of Appeals has established a "strong default presumption . . . that the FAA, not state law, supplies the rules for arbitration." *Sovak v. Chugai Pharmaceutical Co.*, 280 F.3d 1266, 1269 (9th.Cir.2002).

Although this default rule has the benefit of simplicity, it overlooks the interpretative process inherent in carrying out the fundamental policy of the FAA of ensuring "the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Sciences*, 489 U.S. at 476, 109 S. Ct. 1248.

The two Supreme Court decisions further stand for separate propositions. The issue in *Volt* was not contract interpretation, *see Mastrobuono*, 514 U.S. at 60 n. 4, 115 S.Ct. 1212 ("we did not interpret the contract *de novo* . . . [but i]nstead . . . deferred to the California court's construction of its own State's law"), in concluding that "even if §§ 3 and 4 of the FAA are fully applicable in state-court proceedings, they do not prevent application of CAL. CIV. PROC. CODE ANN. § 1281.2(c) to stay arbitration where, as here, the parties have agreed to arbitrate in accordance with California law," *Volt Info. Sciences*, 489 U.S. at 477, 109 S.Ct. 1248. *Mastrobuono*, in comparison, did not simply accept the interpretation of the lower courts and devoted a substantial portion of its decision to interpretation of the agreement.[4] *See Mastrobuono*, 514 U.S. at 60 n. 4, 115 S.Ct. 1212 ("[i]n the present case, by contrast, we review [*de novo*] a federal court's interpretation of this contract, and our interpretation").

As *Volt* resolves the question of whether the very state statute at issue here, § 1281.2(c), is preempted by the FAA, all that remains is a question of contract interpretation. In

[4] *Volt* involved the substantial deference afforded an interpretation of an agreement by the California Court of Appeal, *see Bush v. Gore*, 531 U.S. 98, 114, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000) ("we generally defer to state courts on the interpretation of state law"), whereas *Mastrobuono* involved unrestricted review of the interpretation of an agreement by a federal court, *see Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("a court of appeals should review *de novo* a district court's determination of state law").

cases involving a choice-of-law provision, "that provision must be honored, and a court interpreting the agreement must follow the law of the jurisdiction selected by the parties." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (Thomas, J., concurring); *Volt Info. Sciences, Inc.*, 489 U.S. at 474, 109 S.Ct. 1248 ("the interpretation of private contracts is ordinarily a question of state law"). Concerns applicable to interpretation under state law have been defined as follows:

> [S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.

Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela, 991 F.2d 42, 46 (2d Cir.1993).

The interaction between an arbitration clause, undisputedly governed by the FAA, and a generic choice-of-law clause, further involves the interaction of state and federal law.

> When required to determine the legal standards governing a particular controversy, courts typically confront two choice-of-law questions. The first is the horizontal question: whether the laws of State X or State Y supply the relevant rule of decision. Choice-of-law doctrines (and, consequently, choice-of-law clauses) speak to this issue. The second choice-of-law question that courts face is the vertical one: whether the rule of decision is supplied by the laws of State X or by federal law.

Roadway Package Sys., 257 F.3d at 293. Although the problem definition is clear, the resolution is not. The court in *Kayser* proceeded to conclude that

> [j]udge-made choice-of-law doctrines (and, accordingly, attempts by contracting parties to influence their application with choice-of-law clauses) have no applicability to answering [the second] question because the relevant rule is supplied by the Constitution itself: a valid federal law preempts any state law purporting to regulate the same issue.

Id. at 293-94. The interaction of federal and state law requires determination of the parties' ability to contract around the FAA. *See id.* at 294. Although the FAA preempts state arbitration rules, absent the parties' intent to incorporate the same, state law provides the tools by which the intent of the parties is ascertained. If the parties so intend it, the otherwise preempted state arbitration law supersedes the FAA by the parties' choice. The resolution of the question lies in fundamental principles of contract interpretation under, in the present case California, state law.[5]

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[5] It is significant to note that the present dispute is not one of arbitrability of an issue, *i.e.*, "whether the . . . agreement creates a duty for the parties to arbitrate the particular grievance," *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 647, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986), or "whether [there is an agreement] to arbitrate the merits" of the dispute, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *see also Nat'l Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 135 (2d Cir.1996) ("The 'arbitrability' of a dispute comprises the questions of (1) whether there exists a valid agreement to arbitrate at all under the contract in question . . . and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement."). This dispute involves the "allocation of power between alternative tribunals." *Mastrobuono*, 514 U.S. at 60, 115 S.Ct. 1212.

As a court sitting in diversity, in the present case this Court is bound by the decisions of the California Supreme Court, and in the absence of a decision must estimate how that court would construe the present agreement. *See Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967) ("[i]f there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State"); *Francis v. INA Life Ins. Co.*, 809 F.2d 183, 185 (2d Cir.1987). No similar provision has been interpreted by the California Supreme Court involving an arbitration agreement.[6] As such, the provision will be interpreted pursuant to California law giving due regard to the decisions of its state courts.

Under California law, a contract must be interpreted as to give effect to the mutual intent of the parties. CAL. CIV. CODE § 1636. Intent is derived from the language of the agreement, if clear and explicit, *id.* § 1638; *Universal Sales Corp. v. Cal. Press Mfg. Co.*, 20 Cal.2d 751, 128 P.2d 665 (1942), and such intent, when a contract is reduced to writing, should be ascertained from the writing alone when possible, CAL. CIV. CODE § 1639. Ambiguities in contractual terms are resolved through review of "the entire agreement" and guidance sought from "the circumstances and relations of the

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[6] The choice of law clause at issue in *Volt* was denied discretionary review by the California Supreme Court. *Volt Info. Sciences*, 489 U.S. at 472-73, 109 S.Ct. 1248. As such, the denial may not be read as an endorsement of the opinion of the California Court of Appeals. *See Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-19, 70 S.Ct. 252, 94 L.Ed. 562 (1950) (noting that "there are . . . conflicting and, to the uninformed, even confusing reasons for denying petitions for certiorari"); *Camper v. Workers' Comp. Appeals Bd.*, 3 Cal.4th 679, 12 Cal.Rptr.2d 101, 836 P.2d 888, 894 n. 8 (1992) ("a denial of a petition for review is not an expression of opinion of the Supreme Court on the merits of the case").

parties at the time of the execution of their agreements and of the insertion of particular clauses therein." *Smith v. Carlston*, 205 Cal. 541, 271 P. 1091, 1094 (1928).

In *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 11 Cal.Rptr.2d 330, 834 P.2d 1148, 1154 (1992), the court construed a choice of law clause providing that "[t]his agreement shall be governed by and construed in accordance with Hong Kong law," which is substantially similar to the present choice of law clause providing that the "[a]greement shall be governed by and construed according to the laws of the state of California." Although the choice of law issue involved therein was the breadth of substantive law encompassed by the choice-of-law, the decision provides guidance on both interpretation of agreements involving sophisticated commercial entities and the import of the very language contained in the present choice-of-law clause.

As to agreements between sophisticated entities, the court in *Nedlloyd* points out that

> [Defendant's] view of the problem—which would require extensive litigation of the parties' supposed intentions regarding the choice-of-law clause to the end that the laws of multiple states might be applied to their dispute—is more likely the product of post-dispute litigation strategy, not predispute contractual intent. If commercially sophisticated parties (such as those now before us) truly intend the result advocated by [defendant], they should, in fairness to one another and in the interest of economy in dispute resolution, negotiate and obtain the assent of their fellow parties to explicit contract language specifying what jurisdiction's law applies to what issues.

Id. at 1154. The highest court in California therefore concluded that sophisticated commercial parties, as involved in the present case, would necessarily craft the choice-of-law

provision to reflect a narrower application of the law of the forum state. Inclusion of the phrase "governed by" was construed as "signifying a relationship of absolute direction, control, and restraint. Thus, the clause reflects the parties' clear contemplation that 'the agreement' is to be completely and absolutely controlled by" the law of the forum state. *Id.* at 1153-54. As such, the California Supreme Court would conclude, under the same circumstances, that the choice of law clause would incorporate the state rules applicable to arbitration proceedings, regardless of its characterization as a procedural rule. *See Hambrecht & Quist Venture Partners v. Am. Med. Int'l*, 38 Cal.App.4th 1532, 1548, 46 Cal.Rptr.2d 33 (1995) (reading identical language as incorporating both substantive and procedural law of forum).[7]

Of the appellate decisions cited, only *Mount Diablo Medical Center v. Health Net, Inc.* 101 Cal.App.4th 711, 124 Cal.Rptr.2d 607 (2002), bears mentioning. In concluding that the choice-of-law clause incorporated state rules governing arbitration, the court indicated that

> the starting point in the interpretation of the choice-of-law clause, like any contractual provision, is with the language of the contract itself. While [defendant] attempts to group all choice-of-law clauses that make no explicit reference to arbitration under the rubric 'generic,' the term has no precise definition. If by that term is meant a choice-of-law provision that states that the agreement will be governed by the law of a particular state without elaborating the specific provisions of state

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[7] *Cronus Investments, Inc. v. Concierge Services, LLC*, 107 Cal.App.4th 1308, 133 Cal.Rptr.2d 384 (2003), cited by plaintiff, is unpublished and by rule without any precedential value. *See* CAL. R. CT. 977(a) (providing that "[a]n opinion of a Court of Appeal . . . that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding").

> law to which it applies . . ., and if such a 'generic' provision is insufficient to incorporate the state's laws concerning the enforcement of arbitration agreements, requiring such a redundancy before the provision will have any effect leads logically to the conclusion that other provisions . . . may also need to contain that redundant choice, e.g., provisions treating indemnification rights or termination events in contracts involving the interstate transportation of products. . . . We agree with the observation of the concurring judge in *Roadway Package*, who rejected the approach that the FAA controls absent extrinsic evidence of an intent to contract out of the FAA's default regime . . . in favor of the traditional attempt to discern the intention of the parties, that [t]he choice of law almost invariably is meant to encompass the entire agreement.

Mount Diablo Med. Ctr., 101 Cal.App.4th at 722, 124 Cal.Rptr.2d 607.

Other than the court's citation to the New York Court of Appeals' decision in *Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 193, 623 N.Y.S.2d 800, 805, 647 N.E.2d 1308 (1995), which was later called into question by the Second Circuit Court of Appeals for its application of New York law, the analysis is sound. *See PaineWebber, Inc. v. Bybyk*, 81 F.3d 1193, 1200 (2d Cir.1996) ("In *Mastrobuono*, the Supreme Court rejected the argument that PaineWebber makes here and the argument that the New York Court of Appeals advanced in *Luckie* . . . . [A] choice of law provision, without more, cannot impute a specific intent of the parties to exclude punitive damages."). The present

conclusion does not, however, rest on the proper application of New York law.[8]

The above conclusion is not inconsistent with *Mastrobuono*. The central issue therein was "whether the arbitrators' award is consistent with the central purpose of the Federal Arbitration Act to ensure that private agreements to arbitrate are enforced according to their terms." *Mastrobuono*, 514 U.S. at 53-54, 115 S.Ct. 1212 (internal quotation marks omitted). As New York law precluded arbitrators from awarding punitive damages, *id.* at 58, 115 S.Ct. 1212, and the agreement to arbitrate provided for an award of punitive damages, *id.* at 64, 115 S.Ct. 1212, the FAA would "withdr[aw] the power of [New York] to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration," *id.* at 56, 115 S.Ct. 1212 (internal quotation marks omitted). Unlike the prohibition placed on the recognition of arbitration awards imposed by New York law in *Mastrobuono*, the "application of CAL. CIV. PROC. CODE ANN. § 1281.2(c) to stay arbitration under this contract in interstate commerce, in accordance with the terms of the arbitration agreement itself, '[will not] undermine the goals and policies of the FAA.' " *Volt Info. Sciences*, 489 U.S. at 470-72, 109 S. Ct. 1248.

This conclusion is further not in conflict with Second Circuit precedent offered as contrary authority. "[T]he standard . . . choice-of-law clause in the . . . [policy], on its

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[8] The *Smith Barney* court ultimately held that "when the parties chose to apply New York law, without excluding its arbitration rules from that general condition . . . the parties adopted as binding New York's rule that threshold Statute of Limitations questions are for the courts." *Id.* at 202, 623 N.Y.S.2d 800, 647 N.E.2d 1308. This negative implication, *i.e.*, that a party must expressly exclude state arbitration rules from a general choice of law clause, was rejected in *Mastrobuono*.

own, is [not] sufficient to incorporate . . . [state] law on the allocation of powers between the court and the arbitrator." *Nat'l Union Fire Ins. Co.*, 88 F.3d at 134; *Doctor's Assocs. v. Distajo*, 107 F.3d 126, 131 (2d Cir.1997) ("even the inclusion in the contract of a general choice-of-law clause does not require application of state law to arbitrability issues, unless it is clear that the parties intended state arbitration on a particular issue"). Consistent with the foregoing analysis, both cases providing this general statement involved the application of New York law, as did *Mastruono*.[9]

As § 1281.2(c) is found to be applicable, TIG argues that plaintiff's failure to raise the issue within the last year constitutes waiver. TIG further argues that the denial of plaintiff's request to stay the proceedings precludes the present motion by virtue of collateral estoppel.[10]

On August 21, 2002, TIG's motion to stay the case pending arbitration was denied as it was not apparent that

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[9] There is evidence that TIG insisted that the parties designate California as the applicable law. Although such evidence is admissible to clarify an ambiguity, *see Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641, 644-45 (1968) ("Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose."), it is not clear how insistence on California law would bear on interpreting the agreement to include state arbitration rules.

[10] It is unclear how the panel's decision could collaterally estop a motion to stay arbitration proceedings. As discussed above, the power to stay is discretionary and vested in the court, not the arbitrator. The fact that plaintiff first sought a stay from the arbitration panel has no apparent preclusive effect on its ability to seek the same through authority specifically allocated to the court under California law. As such, and as the matter is procedural rather than substantive, placing the issue outside the normal adjudication accorded preclusive effect, the matter need not be discussed further.

arbitration would provide a more expeditious resolution than would litigation, nor was it apparent that arbitration would address all issues involved herein. At the time the denial issued, it was possible an award would issue prior to February 20, 2003, which might facilitate a resolution to non-arbitrable issues in the third-party complaint. According to TIG, the arbitration proceedings will not conclude until August 2003, after which the panel has sixty days, barring any extensions, to issue an award. As the present case likely will proceed to trial contemporaneously with the arbitration award, there now is a very real possibility that the two judgments, both involving comparable substantive issues, will issue simultaneously, precluding any efforts to introduce one judgment to another proceeding. As such, if defendant establishes fraud on the part of TIG at trial, and TIG prevails in arbitration, plaintiff may find itself in the unenviable position of covering TIG but losing reinsurance for such losses.[11] Given the substance of the denial of TIG's motion to stay one year ago indicating efficient resolution of claims was paramount, and in light of present facts, plaintiff did not waive its right to move to stay arbitration proceedings through its delay.

III. CONCLUSION

Plaintiff's motion to stay (Doc. No. 247) is granted.

SO ORDERED.

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[11] Contrary to TIG's position, it is neither inconsistent nor unjust to deny its motion to stay based on inherent authority then to grant plaintiff's motion one year later based on facts that have developed over the course of the past year.

APPENDIX C

Franklin D. Haftl
Reinsurance Consulting—Arbitration Services

May 26, 2003 R.S.V.P. _____

Interim Final Award

To: Mr. David J. Grais, Esq.—Dewey Ballantine, LLP Attorney for the Respondent.

Mr. Harry P. Cohen, Esq.—Cadwalader, Wickersham & Taft, Attorney for the Petitioner

In the Matter of the Arbitration between

TIG Insurance Company, Petitioner

And

Security Insurance Company of Hartford, Respondent

Regarding Respondents: *Motion for an Order Staying this Arbitration Pending the Trail of the Related Matters*

The panel of Arbiters having received a Brief from Respondent on the Motion to Stay dated May 5, 2003, a reply Brief from on the Motion to Stay from the Petitioner dated May 14, 2003 and a sur-reply Brief from Respondent, along with attached exhibits thereto, convened a conference call on Monday, May 26, 2003 to consider the arguments of the parties presented to the arbiters in their respective briefs.

The panel having fully discussed the presentations by the parties on the *Motion to Stay*, by a majority of the Panel, the *Motion to Stay the Arbitration Pending a Trial of the Related Matters is Denied.*

Signed on behalf of the Majority of the Panel

/s/ Franklin D Haftl
FRANKLIN D HAFTL
Dated May 26, 2003

Cc; Dennis C. Gentry, Arbiter, Robert Mangino, Sr. Arbiter, Mark B. Holton, Esq. Gibson, Dunn & Crutcher, LLP

The Award sent by e-mail and signed Hard Copy

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NY 10007

[Filed May 20, 2004]

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of May two thousand four.

SECURITY INSURANCE COMPANY OF
HARTFORD,
Plaintiff-Appellee,

TRUSTMARK INSURANCE COMPANY,
Defendant-Third-
Party-Plaintiff-Appellee

v.

Docket No. 03-7773

TIG INSURANCE COMPANY,
Third-Party-Defendant-
Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant TIG Insurance Company.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk
By: /s/ Arthur M. Heller
ARTHUR M. HELLER
Motions Staff Attorney

APPENDIX E

STATUTORY PROVISIONS

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, c. 392, 61 Stat. 670.)

Cal. Civ. Proc. Code § 1281.2. Order to arbitrate controversy; petition; determination of court

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

(a) The right to compel arbitration has been waived by the petitioner; or

(b) Grounds exist for the revocation of the agreement.

(c) A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact. For purposes of this section, a

pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition. This subdivision shall not be applicable to an agreement to arbitrate disputes as to the professional negligence of a health care provider made pursuant to Section 1295.

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.

If the court determines that there are other issues between the petitioner and the respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of such other issues or until such earlier time as the court specifies.

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party as set forth under subdivision (c) herein, the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding.

(Added by Stats.1961, c. 461, p. 1541, § 2. Amended by States.1978, c. 260, p. 543, § 1.)

APPENDIX F

ARBITRATION AGREEMENT CONTAINED IN WORKERS COMPENSATION UNDERLYING FIRST, SECOND, AND THIRD EXCESS OF LOSS REINSURANCE AGREEMENT

* * * *

ARTICLE XVII

ARBITRATION

As a condition precedent to any right of action hereunder, any irreconcilable dispute between the parties to this Agreement shall be submitted for decision to a board of arbitration composed of two arbitrators and an umpire meeting a place to be agreed by the board.

Arbitration shall be initiated by the delivery of a written notice of demand for arbitration by one party to the other within a reasonable time after the dispute has arisen.

The members of the board of arbitration shall be active or retired, disinterested officials of insurance or reinsurance companies, or Underwriters at Lloyd's, London, not under the control or management of either party to this Agreement. Each party shall appoint its arbitrator, and the two arbitrators shall choose an umpire before instituting the hearing. If the respondent fails to appoint its arbitrator within four weeks after being requested to do so by the claimant, the latter shall also appoint the second arbitrator. If the two arbitrators fail to agree upon the appointment of an umpire within four weeks after their nominations, each of them shall name three of whom the other shall decline two, and the decision shall be made by drawing lots. The claimant shall submit its initial brief within 45 days from appointment of the umpire. The respondent shall submit its brief within 45 days thereafter,

and the claimant may submit a reply brief within 30 days after filing of the respondent's brief.

The board shall make its decision with regard to the custom and usage of the insurance and reinsurance business. The board shall issue its decision in writing based upon a hearing in which evidence may be introduced without following strict rules of evidence but in which cross-examination and rebuttal shall be allowed. The board shall make its decision within 60 days following the termination of the hearings unless the parties consent to an extension. The majority decision of the board shall be final and binding upon all parties to the proceeding. Judgment may be entered upon the award of the board in any court having jurisdiction.

Each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the umpire. The remaining costs of the arbitration proceedings shall be allocated by the board.

* * * *